IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

ANTONIO CRAIG, minor by his Next Friend and Mother, KIMBERLY CRAIG,

Plaintiff-Appellee, and

KIMBERLY CRAIG, individually,

Plaintiff, Not Participating,

v.

OAKWOOD HOSPITAL, a Michigan Corporation,

Defendant-Appellant, and

AJIT KITTUR, M.D., DR. GAVINI, DR. LAKE, MARGARET LAWRENCE, R.N., KAREN SOWISLO, DIRECTOR OF MEDICAL RECORDS, CHILDREN'S HOSPITAL, DR. R. ASMAR, DR. CASH, DR. HERMAN GRAY, DR. H. WALKER, DR. MARY LOGAN, DR. CAROLYN JOHNSON,

Defendants, Not Participating, and

ASSOCIATED PHYSICIANS, P.C. and ELIAS G. GENNAOUI, M.D., and HENRY FORD HOSPITAL, d/b/a HENRY FORD HEALTH SYSTEM,

Defendants/Appellants.
_____/

Supreme Court No. 124121407
Court of Appeals No. 206951
Wayne County Circuit Court
No. 94-410-338-NH

AMICUS CURIAE BRIEF OF MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

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STATEMENT OF THE BASIS OF JURISDICTION

Amicus curiae Michigan Health and Hospital Association relies on Defendant-Appellant Oakwood Hospital's statement of basis of jurisdiction.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW WHICH MHA'S *AMICUS CURIAE* BRIEF ADDRESSES

I. WHETHER THE TRIAL COURT AND COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY REFUSING DEFENDANTS' TIMELY REQUEST FOR A DAVIS-FRYE/MRE 702 HEARING AS TO THE ADMISSIBILITY OF PLAINTIFF'S EXPERT WITNESSES?

MHA Answers:	Yes
This Court Should Answer:	Yes

II. WHETHER THE TRIAL COURT AND COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY PERMITTING PLAINTIFF'S EXPERT WITNESSES TO TESTIFY ABOUT THEORIES THAT LACKED FACTUAL AND/OR SCIENTIFIC SUPPORT?

MHA Answers:	Yes
This Court Should Answer:	Yes

III. WHETHER THE TRIAL COURT AND COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY PERMITTING PLAINTIFF'S EXPERT WITNESSES TO "INTERPRET" THE MEDICAL RECORDS IN A MANNER THAT WAS INCONSISTENT WITH THOSE VERY MEDICAL RECORDS?

MHA Answers:	Yes
This Court Should Answer:	Yes

IV. WHETHER THE COURT OF APPEALS IMPROPERLY HELD THAT IT WAS DEFENDANTS' BURDEN TO SHOW THAT PLAINTIFF'S EXPERT WITNESSES' THEORIES LACKED FACTUAL AND SCIENTIFIC SUPPORT?

MHA Answers:	Yes
This Court Should Answer:	Yes

I. ORDERS APPEALED AND RELIEF SOUGHT

Amicus curiae Michigan Health and Hospital Association ("MHA") files this brief in support of Defendants-Appellants' ("Defendants'") appeal currently pending before this Court. Defendants appeal a Michigan Court of Appeals decision which, in essence, overrules binding precedent from this Court regarding the admissibility of expert witness testimony.

Expert testimony often plays the decisive role in medical malpractice cases. Thus, reliable expert testimony is critically important to the integrity of Michigan jurisprudence and the right of hospitals and doctors to a fair trial. In this case, Plaintiff has been diagnosed with cerebral palsy. Plaintiff alleges that the cerebral palsy resulted from Defendants' malpractice during delivery. In support, Plaintiff put forth two experts who asserted two contradictory theories which were unsupported by the medical records and/or medical science. As a result, Defendants timely requested that the trial court hold a hearing to determine whether such expert testimony met the stringent requirements of MRE 702 (commonly referred to as a Davis-Frye hearing[1]).

The trial court, however, denied Defendants' timely request for a Davis-Frye hearing, and instead permitted Plaintiff's expert witnesses to testify at trial about their "novel" theories. The result was an approximately $35 million judgment against Defendants.

On February 1, 2002, the Court of Appeals, in a published opinion written by Judge Jessica Cooper, affirmed the jury's verdict in all material respects. Among other

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[1] The name "Davis-Frye" is derived from two important cases which established the standard and procedure by which a trial court must scrutinize expert testimony before it will be admitted as evidence. Frye v United States, 293 F 1013 (CA DC, 1923); People v Davis, 343 Mich 340; 72 NW2d 269 (1955).

things, the Court of Appeals held that it was Defendants' burden to show that Plaintiff's expert witnesses were relying on "novel scientific evidence" before the trial court was required to hold such a Davis-Frye hearing.

Simply put, the Court of Appeals' decision is erroneous and should be reversed. First, it was reversible error to deny Defendants a Davis-Frye hearing – especially since Plaintiff's expert witnesses' testimony did not meet the criteria of MRE 702. Secondly, the Court of Appeals' new barrier to a proper Davis-Frye hearing is contrary to well-established Michigan law. Michigan case law and MRE 702 place the burden to show the appropriate scientific basis of an expert witnesses' theory on the party that seeks to put forth that testimony – and not the opposing party.

For the reasons stated herein, MHA respectfully requests that this Court reverse and vacate the Court of Appeals decision, and grant judgment in favor of Defendants.

II. STANDARD OF REVIEW

Questions concerning the admission of evidence ordinarily are committed to a trial court's discretion. People v Layher, 464 Mich 756, 761; 631 NW2d 281 (2000). At issue here, however, is the nature and extent of a trial court's responsibility to ensure the reliability of proposed expert testimony. This is a question of law. Questions of law are reviewed de novo. Kelly v Builder's Square, Inc, 465 Mich 29, 34; 632 NW2d 912 (2001).

III. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

MHA is an association of hospitals and other health care providers throughout Michigan which work with patients and communities to improve health care for all Michigan citizens. MHA is one of the largest associations in Michigan. Its members

include virtually all of the hospitals in this State. Substantially all acute care hospitals in Michigan are Michigan nonprofit corporations.

The questions presented in this appeal, including those relating to the admissibility requirements for medical expert testimony, are of fundamental importance to all health care providers in this State. Issues concerning malpractice are unfortunate, but nevertheless are ever-present, reoccurring, and have a significant impact on the economics of health care. MHA believes that the viewpoint of its members may assist this Court in resolving the issues before it.

A. Plaintiff's Alleged Injury

As detailed more specifically in Defendant Oakwood Hospital's application for writ, Plaintiff alleges that he has a neurological condition known as cerebral palsy. Plaintiff further alleges that the cerebral palsy was caused by an injury to his brain during his mother's labor and delivery at Defendant Oakwood Hospital in July 1980.

In particular, on July 16, 1980, at 6:00 a.m., Defendant Oakwood Hospital admitted Plaintiff's mother, Kimberly Craig. (T20 at 57). Defendant Ajit Kittur, M.D. ordered that an external monitor be placed around Ms. Craig's abdomen in order to record the duration and number of contractions, and nurses also felt the strength of the contractions manually. (T14 at 80-81; Kittur at 22).

At 11:30 a.m., Defendant obstetrician Elias Gennaoui, M.D. examined Ms. Craig, and decided that since Ms. Craig's membranes had been ruptured for six hours, exposing her and the unborn baby to possibly life-threatening infection if the baby was not delivered relatively soon, he would administer 2 miliunits of Pitocin. (T14 at 77, 79). Pitocin is a medication which was, and still is, commonly used to induce contractions.

(T14 at 77, 120; T18 at 15, 63-64; T19 at 88; Kittur at 64-65, 126-128). During the six and one half hours Pitocin was received, Ms. Craig's contractions were monitored at least thirteen times, and the medical records indicate the contractions ranged from mild to moderate. (T14 at 77, 79, 103, 109, 161; T15 at 234-35, 244; T16 at 35; T19 at 185-221; T20 at 167-69; T21 at 7-11, 13, 20, 22, 59; T11 at 113-46). Plaintiff was born at 6:45 p.m., and immediate examinations indicated a normal healthy newborn. (T14 at 113-14; T18 at 180; T20 at 51-52). The medical records and the testimony of the doctors and nurses who cared for Ms. Craig show an uncomplicated labor with no signs of neurological impairment. (T14 at 110-11, 190-200; T15 at 75; T19 at 74-75, 118-121; T24 at 48, 82; T25 at 16).

At three months of age, and for the first time, Plaintiff was diagnosed with having cerebral palsy. (T22 at 115).

B. Plaintiff's Expert Witnesses

At trial, Plaintiff put forth two experts, Dr. Paul Gatewood and Dr. Ronald Gabriel, to testify as to the alleged cause of Plaintiff's cerebral palsy.

(1) Dr. Gatewood's testimony

Dr. Gatewood asserted that Ms. Craig was mistakenly given a massive overdose of Pitocin; and this alleged overdose caused severe and prolonged uterine contractions. Dr. Gatewood claimed that this resulted in a prolapsed umbilical cord that deprived the baby of sufficient blood flow.

Dr. Gatewood, however, could not identify how this alleged event actually injured Plaintiff's brain, and/or caused Plaintiff's cerebral palsy. (T10 at 130; T11 at 6-7, 208). Further, Dr. Gatewood's theory was not supported by any of the medical records.

Importantly, the medical records and the testimony of the treating doctors and nurses described an uncomplicated labor, with only mild to moderate contractions. (T14 at 77, 79, 103, 109, 161; T15 at 234-35, 244; T16 at 35; T19 at 185-221; T20 at 167-69; T21 at 7-11, 13, 20, 22, 59; T11 at 113-46). Put another way, there was no factual evidence to support Dr. Gatewood's conclusion that Ms. Craig had suffered "severe" and "prolonged" contractions during labor.

(2) Dr. Garbriel's testimony

Plaintiff's second expert witness, Dr. Gabriel, offered a second theory of causation which contradicted Dr. Gatewood's theory. In particular, Dr. Gabriel also concluded that Ms. Craig had severe and prolonged contractions during labor, which caused Plaintiff's head to be "pounded" and "ground" into some hard structure in the mother's pelvic anatomy, which in turn caused the brain injury. (T13 at 18-19, 114-16, 125-20).

Importantly, however, Dr. Garbriel could not identify how this alleged event happened because these were "obstetrical questions I'm not competent to answer". (T13 at 114-16, 131-32, 160-61). Dr. Gabriel was also unable to cite to any medical literature confirming that "pounding" and "grinding" inside the womb could actually cause the alleged brain injury. **In fact, Dr. Gatewood – Plaintiff's other expert – later rejected Dr. Gabriel's causation theory as a possible cause because the baby, in utero, is completely surrounded by soft tissue.** (T16 at 170, 178; T17 at 118; T11 at 208; T14 at 112, 206-09). Furthermore, the factual evidence, including the medical records, simply did not support Dr. Gabriel's underlying factual assumption: that Ms. Craig suffered "severe" and "prolonged" contractions.

C. The Trial Court Refuses Defendants' Request For A Davis-Frye Hearing

Based upon the above contradictory sworn testimony of Plaintiff's two expert witnesses, as well as the testimony of Defendants' experts, Defendant Oakwood Hospital timely moved for a Davis-Frye hearing to evaluate this expert testimony under MRE 702. In particular, Defendant Oakwood Hospital requested that the trial judge evaluate the reliability of Plaintiff's expert witnesses' theories in light of the fact that their theories were not grounded in scientific basis or factual support. The trial court denied the motion, holding that such an examination was not necessary unless Defendants could put forth sufficient evidence that these theories were not reliable.

D. The Court of Appeals Affirms The Trial Court

The Court of Appeals affirmed the decision of the trial court to deny Defendants the Davis-Frye hearing. See App Opinion at 4. Among other things, the Court of Appeals addressed the trial court's "gate-keeping" responsibility as to expert witnesses briefly in its published opinion as follows:

> Under the rules of evidence, the trial court is "charged with ensuring that any and all scientific testimony to be admitted [is] not only relevant but also reliable...Pursuant to MRE 702, the Davis-Frye test limits the admissibility of *novel* scientific evidence by requiring the party offering such evidence to demonstrate its general acceptance in the scientific community. However, defendant Oakwood Hospital failed to present any evidence that Dr. Gabriel's testimony was based on *novel* scientific evidence. Absent novel scientific evidence there is no need for the trial court to conduct a Davis-Frye hearing. Therefore, the trial court did not abuse its discretion in denying defendant Oakwood's request." [App Opinion at 3-4, citations omitted].

The Court of Appeals also held that Plaintiff's expert witnesses were permitted to form opinions which were not consistent with the medical records:

> The eyewitnesses in this case had no independent recollection of the events. Like plaintiff's experts, their testimony was based on their interpretations of the medical records...We find that the evidence was contradictory, with plaintiff's expert testifying to his opinion that the record showed that plaintiff received more Pitocin than ordered, and defendants' witnesses testifying to their belief that this did not happen." [App Opinion at 4-5].

IV. ARGUMENT

A. Michigan Law Regarding Admission Of Expert Testimony

"Gate-keeping" describes the duty of the trial court under MRE 702 to ensure that the expert testimony that reaches the jury is based on sound and recognized science, and that the expert's theory is firmly based on the established facts of the case. See Daubert v Merrell Dow Pharmaceuticals, Inc, 509 US 579, 589 (1993). The trial court's "gate-keeping" responsibility functions to protect the jury from unfounded theories. As Daubert states: "expert evidence can be both powerful and misleading because of the difficulty in evaluating it." Id. at 595.

The expert's appearance communicates to the jury that his or her opinions are entitled to be treated as evidence because, based on the expert's specialized knowledge, he must be better equipped than the jury to interpret the facts and answer the same dispositive questions of causation that the jury will ultimately be called upon to answer. Because of the risk that the jury will give undue weight to experts, "the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Id. (quoting Weinstein, 138 FRD 631, at 632 (1991)). These concerns were addressed in Porter v Whitehall Laboratories, Inc, 791 F Supp 1335, 1345 (SD IND 1992):

> [T]here is a risk that the jury would make an irrational finding of causation based upon the siren-like allure of opinions stated by highly qualified experts. Thus, an expert's opinion must have some basis other than hypothesis before the opinion may have the privilege of being assailed by cross-examination.

In medical malpractice cases, presenting the opinion of a medical expert sends the powerful message that the opinion must at least enjoy some support in medical science. However, when the testimony is based solely on hypothesis, it is not only unhelpful to the jury in evaluating the medical facts, it diverts the jury's focus from an assessment of the established medical facts. The difficulty of the determination whether the reasoning underlying the expert testimony can be applied to the facts in issue was recognized by the US Supreme Court in Daubert, which stated "[w]e are confident that federal judges possess the capacity to undertake this review." Id. at 593. The judge, not the jury, must be the "gate-keeper" and analyze the foundation to assure that theory and conjecture are not presented to the jury in the guise of legitimate, scientifically sound opinion.

In Nelson v American Sterilizer, 223 Mich App 485; 566 NW2d 671 (1997), the Court of Appeals characterized the trial court's responsibility to scrutinize expert opinion:

> The question... is scientific in nature, and it is to the scientific community that the law must look for the answer. For this reason, expert witnesses are indispensable in this case. But that is not to say that the trial court's hands were inexorably tied, or that it must have accepted uncritically any sort of opinion espoused by either party's proffered experts merely because their credentials rendered them qualified to testify. To the contrary, under the rules of evidence, the trial court was charged with ensuring that any and all scientific testimony to be admitted was not only relevant, but also reliable." [Id. at 489].

(1) Davis-Frye Hearings

Michigan courts perform this "gate-keeping" responsibility by conducting Davis-Frye hearings, in which the court is to examine the testimony of the expert witness under a two-prong analyses: (1) to ensure reliability, the trial court evaluates the scientific basis of the testimony, see American Sterilizer, 223 Mich App at 491; and (2) to ensure relevancy, the trial court compares the factual basis of the expert testimony to the established factual record in order to ensure that the theory "fits" within the established facts of the case. See Badalamenti v William Beaumont Hospital, 237 Mich App 278, 286-289; 602 NW2d 854 (1999).

(2) When the Scientific Basis of Expert Testimony is Called Into Question, the Proffering Party Must Show That The Expert Testimony Is Supported By Recognized Scientific Knowledge

Under the first "prong" of a Davis-Frye hearing, the party putting forth the expert testimony must show that the proffered testimony is recognized within the appropriate scientific community (here, the medical community), and is not based on some sort of "novel" or "junk" science. Because MRE 702 restricts the subject of an expert's testimony to "recognized scientific . . . knowledge," the trial court must ensure that the scientific basis of the expert testimony is generally accepted in the relevant field. American Sterilizer, 223 Mich App at 490. The factors a court must consider in order to determine whether the expert testimony is recognized are codified in MCL §600.2955, which provides in relevant part:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making the determination, the court shall examine the opinion and the basis for the opinion, which

> basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community...
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
>
> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

The factors found in MCL §600.2955 echo those found in Daubert, and these factors *must* be considered by the trial court. See Daubert, 509 US at 591-95; see also Greathouse v Rhodes, 242 Mich App 221, 237-38; 618 NW2d 106 (2000). As the Court of Appeals stated in Greathouse: "the plain language of the statute establishes the Legislature's intent to assign the *trial court* the role of determining, pursuant to the Daubert criteria, whether proposed scientific opinion is sufficiently reliable for jury

consideration." Id. at 238 (italics in original). Because the legislature has explicitly placed this duty on the trial court, the trial court's "gate-keeping" function is mandatory.

For example, in American Sterilizer, 223 Mich App at 485, the plaintiff claimed injury from exposure to a chemical used to sterilize medical equipment. Id. at 487. The trial court held a Davis-Frye hearing in the trial court and ruled that the expert testimony was inadmissible because the opinions were not recognized by the scientific community. Id. This Court vacated the Court of Appeals' reversal, and on remand the Court of Appeals affirmed the trial court's determination that the experts' opinions lacked the requisite objective scientific validation. Id.

In American Sterilizer, the Court of Appeals also outlined the following order of analysis that trial courts should undertake with a Davis-Frye hearing: (1) the judge must determine whether there is objective, independent validation for the expert opinion, id.; (2) the judge must then determine that the objective, independent validation is recognized in the relevant scientific community and reliable insofar as it was generated from the use of accepted methodology in the particular field, id.; and (3) the judge must determine whether the objective, independent foundation justifies the expert's conclusion. Id.

(3) The Requirement of a "Fit" between the Record and the Expert Testimony

Under the second "prong" of a Davis-Frye hearing, expert testimony must also be examined for relevancy. See Daubert, 509 US at 591. Because MRE 702 allows only testimony that "will *assist* the trier of fact to understand the evidence," the expert's theory must be relevant to a disputed issue. MRE 702 (emphasis added). As the Court of Appeals stated in Badalamenti, 297 Mich App at 278, "an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established

facts." Id. at 858. This requirement has been described as one of "fit." Daubert, 509 U.S. at 591. As "[f]it is not always obvious...Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Id.

The "fit" requirement places a "gate-keeping" duty on Michigan trial courts to reject expert testimony that is not substantially supported by the established record as inadmissible speculation. As this Court explained in Skinner v Square D Co, 445 Mich 153, 164; 516 NW2d 669 (1990), "at a minimum, a causation theory must have some basis in established fact...only slight evidence is not enough." In accordance with Skinner and the authorities cited below, the judicial "gate-keeper" must determine whether the established record supports the reasonable inference that each one of the factual assumptions on which the expert's theory of cause and effect depends is accurate.[2]

(4) The Procedure For Seeking A Davis-Frye Hearing

A Davis-Frye hearing allows the trial judge to evaluate expert testimony outside the presence of the jury. See American Sterilizer, 223 Mich App at 490 (wherein the Court of Appeals affirms the trial court's granting of motion in limine, and subsequent barring of plaintiff's experts because experts did not rely on proper scientific methodology). Michigan courts have established a procedure which triggers a Davis-Frye hearing, through which trial courts can perform the mandatory analysis that ensures expert testimony performs its valuable function in the most reliable way possible. See e.g., Amorello v Monsanto Corp, 186 Mich App 324; 463 NW2d 487 (1990).

This procedure can be summarized as follows: (1) opposing party challenges the evidentiary basis of the expert testimony, (2) the trial court examines the proffering

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[2] See, e.g., Kaminski v Grand Trunk Western R Co, 347 Mich 417; 79 NW2d 899 (1956); Badalamenti, 237 Mich App at 278.

party's evidence supporting the expert testimony, and (3) the trial court rules on the admissibility of the expert's theory in accordance with MRE 702's stringent requirements. Monsanto, 186 Mich App at 332.

As Monsanto makes clear, once the opposing party asserts that the expert's opinion is not in compliance with the Daubert factors, the sponsoring party then has the obligation of substantiating the sound basis of the specialized knowledge. See Monsanto, 186 Mich App at 329-32. In Monsanto, the defendants asserted that no scientific study has shown that the plaintiff's expert's testimony was considered reliable, and this triggered the MRE 702 analysis. Id. at 328.

(5) The Party Putting Forth The Expert Testimony Has The Burden To Show Its Admissibility

Under Michigan law, the party putting forth the expert testimony has the burden of showing that the expert testimony meets all of the necessary criteria. For example, in Monsanto, 186 Mich App at 324, plaintiff alleged that his health problems were caused by exposure to PCBs which leaked from a transformer, and supported this allegation with expert testimony regarding the health effects of PCBs. Id. at 326-27. Defendants then asserted that no scientific study or reliable scientific literature supported the plaintiff's expert's testimony. Id. at 328. After examining the plaintiff's supporting evidence on the basis of the expert's testimony, the trial court held that plaintiff failed to present sufficient evidence that there was a causal connection between the transformer leak and plaintiff's medical problems. Id. at 329. The Court of Appeals affirmed, stating that "Plaintiffs offer no evidence to rebut defendants' claim that the testimony of plaintiffs' experts did not have a reasonable medical or reliable scientific basis and is not supported by scientific and medical literature." Id. at 332.

B. This Case Should Be Reversed And Judgment Entered In Favor of Defendants Because The Trial Court Failed To Conduct The Necessary Davis-Frye Hearing

Simply put, the trial court committed reversible error when it denied Defendants' motion for a Davis-Frye hearing. Here, Defendants timely moved for a Davis-Frye hearing regarding the admissibility of Plaintiff's expert witnesses' testimony. Further, Defendants presented sufficient evidence – including the contradictory evidence of Plaintiff's own expert witnesses – to show Plaintiff's experts' testimony did not meet the stringent requirements of MRE 702. As described above, under well established Michigan law (e.g. Monsato, 186 Mich App at 324), the trial court was then required to conduct the Davis-Frye hearing to determine whether Plaintiff's expert witnesses' testimony met the necessary criteria of MRE 702 before such testimony was presented as evidence at trial. The trial court's refusal to conduct this hearing was improper, prejudiced Defendants, and constitutes reversible error.

C. Had The Trial Court Conducted The Required Davis-Frye Hearing, Then it Would Have Found That Plaintiff's Expert Testimony Was Inadmissible

Of course, the Davis-Frye hearing would have revealed that Plaintiff's expert witnesses' testimony did not meet the requirements of MRE 702, and therefore should not have been admitted at trial. Had the lower courts correctly performed their "gate-keeping" function and held a Davis-Frye hearing, the testimony of Plaintiff's experts would have been ruled inadmissible because (1) the theories presented were not supported by medical science, (2) the theories presented failed to show causation, and (3) the theories did not adhere to the established facts of the case.

(1) Dr. Garbriel's Testimony Was Inadmissible Under MRE 702 Because It Was Not Supported By Well-Established Scientific Medicine

First, Dr. Gabriel's theory that the brain injury was caused by an overdose of Pitocin which led to the fetus "pounding" and "grinding" into some hard structure in Ms. Craig's pelvis, has no medical support. Notably, Dr. Gabriel could not put forth any objective validation and/or scientific support for his "pounding" and "grinding" theory. Instead, Dr. Gabriel vaguely alluded to studies in the 1950's and '60's that allegedly supported his causation theory, but no such studies were ever produced. To date, Plaintiff has never been able to provide even one citation to any medical or scientific publication to support this "novel" theory.

In fact, Plaintiff's other expert witness – Dr. Gatewood – specifically refuted that Dr. Gabriel's "pounding" and "grinding" theory was even medically plausible because the baby, in utero, is completely surrounded by soft tissue, and thus protected from such damage.

Accordingly, the trial court, with the approval of the Court of Appeals, erred in failing to strike Dr. Gabriel's testimony as unsupported in the medical field. See e.g. Monsanto 186 Mich App at 329-32 (the Court of Appeals dismissed expert testimony because plaintiffs failed to present any affidavits or documentary evidence to support the deposition of the plaintiffs' expert stating that their health problems were caused by the alleged exposure to PCBs from the transformers).

Secondly, assuming, *arguendo*, that Dr. Gabriel's vague allusions to decades-old literature were somehow sufficient to meet Plaintiff's significant burden to show that this theory was independently recognized, Dr. Gabriel's testimony is still inadmissible because he was unable to explain how such studies justified the "pounding" and

"grinding" theory of fetal brain injury. Importantly, Dr. Gabriel's references at trial to "monkey studies" on the general effects of Pitocin (T13 at 22-23, 25) do not reliably answer the general causation questions at issue here – whether overdoses of Pitocin cause severe contractions, and if so, whether these contractions support the conclusion that possible "pounding" and "grinding" of the fetus caused the alleged brain injury. In fact, Dr. Gabriel was unable to offer citations to any supporting studies, nor could he explain how any such studies supported his novel "pounding" and "grinding" theory of fetal brain injury. Accordingly, this testimony should not have been admitted under MRE 702 because the plaintiff's expert could not show how his alleged scientific foundation justified his conclusions.

Similarly, in American Sterilizer, the trial court and the Court of Appeals found that the animal studies cited as support for the plaintiffs' experts' opinion did not provide the requisite reliability for the application of the opinion to humans. Id. at 495. The Court of Appeals held that the general causation question at issue – does low level chronic exposure to EtO cause liver disease in humans? – was not reliably answered by the animal studies the experts cited, and accordingly the court did not allow the testimony. Id. at 497-498.

(2) Dr. Gabriel And Dr. Gatewood's Theories Of A Pitocin Overdose Causing Severe Contractions Were Inadmissible Because It Was Not Supported By The Medical Records

The trial court and the Court of Appeals also committed reversible error in not excluding the testimony of both Dr. Gabriel and Dr. Gatewood because the theories offered by both experts did not match the established facts in the record. In particular, the medical records did not support Plaintiff's experts' conclusion that Ms. Craig had

suffered dangerously severe contraction as a result of an overdose of Pitocin. (T14 at 77, 79, 103, 109, 161; T15 at 234-35, 244; T16 at 35; T19 at 185-221; T20 at 167-69; T21 at 7-11, 13, 20, 22, 59; T11 at 113-46).

As the Court of Appeals stated in Badalamenti, 297 Mich App at 858, "an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts." Here, the Court of Appeals further compounded this error by failing to give due weight to the medical records, in further violation of this Court's holding in People v Kritdoll, 391 Mich 370; 217 NW2d 37 (1974).

For example, the Court of Appeals in Badalamenti, 237 Mich App at 278, enforced the "fit" requirement between the expert's theory of causation and the established facts of the case. In that case, the plaintiff's expert witness testified that the defendants were negligent in failing to diagnose and treat the plaintiff for cardiogenic shock. Id. at 281. In overturning a jury verdict based on that testimony, the Court of Appeals held that there were fatal inconsistencies between the theory of the plaintiff's expert and the facts as established by the medical records and the testimony of the witnesses who were present at the time of the plaintiff's treatment. Id. at 288-89. The medical records established that the plaintiff's hemodynamic measurements and echocardiograms confirmed normal heart function, which, the plaintiff's expert agreed, is a finding inconsistent with cardiogenic shock. Id. at 287-88. The court held that the plaintiff's expert's opinion was "based on assumptions that are not in accord with the established facts", the thus the expert's opinion could not be "substantial, legally sufficient evidence" on which a jury could base a verdict. Id. at 286, 288-89.

Here, the expert testimony was even further removed from the medical records. In particular, Dr. Gatewood and Dr. Gabriel presented a theory of causation based on an alleged overdose of Pitocin which, they claimed, caused Ms. Craig to suffer dangerously "severe" and "prolonged" contractions. The medical records, however, provide no such support for this novel theory. Instead, the medical records describe in detail an uncomplicated labor with contractions never more intense than "moderate." (T14 at 77, 79, 103, 109, 161; T15 at 234-35, 244; T16 at 35; T19 at 185-221; T20 at 167-69; T21 at 7-11, 13, 20, 22, 59; T11 at 113-46). Because Plaintiff's experts' assumptions "are not in accord with the established facts," Badalamenti, 237 Mich App at 286, the evidence was insufficient to prove causation, and thus, Plaintiff's experts' testimony was inadmissible under MRE 702. Had the Court of Appeals properly compared the testimony to the established facts, the testimony would have been stricken.

(3) The Court Of Appeals Incorrectly Held That The Medical Records Were "Open" To Interpretation Because There Were No Eyewitnesses With Independent Recollection Of The Events

In response, the Court of Appeals found that Badalamenti was not applicable because in this case there were no eyewitnesses with independent recollection of the events, and thus Plaintiff's experts were entitled to "interpret" the records. App. D., at 8. The Court of Appeals holding, however, fails to recognize that Michigan law considers medical records sufficiently trustworthy to fall under an exception to the hearsay rule, and thus eyewitness confirmation is not necessary. See MRE 803(6). For example, this Court in Kirtdoll, 391 Mich at 370, explained that medical records are reliable because they "are made and relied upon in affairs of life and death...physicians and nurses can

ordinarily recall from actual memory few or none of the specific data entered they themselves rely upon the record of their own action." Id. at 387 n9.

Accordingly, the Court of Appeals' distinction between eyewitness testimony and medical records fails to take into account that medical records are considered trustworthy precisely *because* few of those present will be able to recall what occurred, and doctors and nurses need to rely on these records in making life and death decisions.

Rather than give sufficient weight to the reliability of medical records and recognize how these established facts made Plaintiff's expert witnesses' testimony irrelevant – i.e., that the medical records did not support a finding of "severe" or "prolonged" contractions – the Court of Appeals characterized these expert witnesses' wild conjecture as legitimate "interpretation" of the medical records. This holding misapplies both Badalamenti and Kirtdoll, and should be reversed.

The Court of Appeals' abandonment of its duty to ensure "fit" as required by Daubert and Badalamenti opens the door to expert testimony that is not constrained by the record, thereby opening the gates to the concern that "the jury would make an irrational finding of causation based upon the "siren-like" allure of opinions stated by highly qualified experts." Porter, 791 F Supp at 1345.

Under the Court of Appeals' new rule, experts will be free to re-write medical records to conform to their theories of what took place, even when the contents of the record do not affirmatively support the expert's version of events. If such a rule is allowed to stand, it will compromise the rights of hospitals, doctors and other medical professionals to receive a fair trial. Furthermore, the inevitable costs of enormous and unfounded verdicts will be spread throughout the health care system, leading to

astronomical health care increases. It is therefore imperative that this Court intervene and send a clear message that the law in Michigan has not changed: expert testimony must be based on facts established in the record, regardless of whether those facts are established by eyewitness testimony or contemporaneous medical records.

(4) The Failure Of The Lower Courts To Perform The Mandatory "Gate-Keeping" Function Will Open The Door To Admission Of More Improper Expert Testimony Which Fails To Meet The Requirements Of MRE 702

The failure of the lower courts to perform their mandatory "gate-keeping" duty and properly evaluate the Daubert and MRE 702 factors led to an unsupported judgment. Instead of ensuring that expert testimony is "not only reliable, but relevant," American Sterilizer, 223 Mich App at 489, the lower courts improperly allowed Dr. Gabriel to testify based on no more than his own credentials and his "say so," even though his theory of fetal brain injury has never been recognized as anatomically possible by anyone (including Dr. Gatewood) other than Dr. Gabriel himself; and even though no inquiry was made by the trial court into whether the content and methodology of the studies justified this extraordinary result.

Further, the lower courts allowed Plaintiff's expert witnesses to present a theory – severe and prolonged contractions – which had no support in the medical records. By affirming the trial court's abandonment of its "gate-keeping", the Court of Appeals has effectively made the protections of MRE 702 meaningless. The potential abdication of the trial court's "gate-keeping" function through the Court of Appeal's new rule will have devastating effects on the fairness of medical malpractice hearings. As the Court of Appeals stated in Greathouse, "the experts who will testify concerning [the applicable standard of care] are so crucial to medical malpractice litigation that the Legislature

requires both sides of a case to identify at least one expert at the commencement of the lawsuit." Id. at 229; see also MCL §600.2912d(1). The Court of Appeals' decision, however, utterly ignores this concern. This abdication of the trial court's "gate-keeping" role invites more unfounded multi-million dollar judgments based on anatomically impossible evidence. Put another way, this potential liability to even the most baseless claims threatens this state's already overburdened health care system with enormous cost increases because of similar arbitrary judgments.

D. The Court Of Appeals Erroneously Held That The Burden Of Proving That An Expert Witness' Testimony Is Inadmissible Falls Upon The Party Opposing The Expert Testimony

Not only did the Court of Appeals erroneously affirm the trial court's refusal to hold a Davis-Frye hearing, but the Court of Appeals also incorrectly held that it is the burden of the party opposing the expert testimony to prove that the expert witness' testimony does not rest on the necessary scientific foundation. This holding dramatically departs from established precedent regarding the implementation of MRE 702 by adopting a new rule requiring the opposing party to prove "novelty" before the court is required to discharge its mandatory "gate-keeping" function.

Simply put, the Court of Appeals misunderstood the "gate-keeping" role of the trial court in holding that "absent novel scientific evidence there is no need" for a Davis-Frye hearing. See App Opinion at 4. The Court of Appeals new "gate-keeping" rule imposes an improper burden on the litigant who challenges the scientific foundation of expert testimony to establish that the expert's theory is NOT recognized in the relevant community. This holding misapplies the analysis set out in MCL §600.2955 and

Daubert, and incorrectly allocates the burdens of showing compliance with these standards.

Furthermore, in establishing a threshold novelty requirement, the Court of Appeals' opinion conflicts with an important aspect of Daubert: that the relevant factors to be considered in evaluating expert testimony do not focus exclusively on novel or unconventional evidence. Daubert, 509 US at 593 n11. Rather, the factors set forth in MCL §600.2955 and Greathouse, 242 Mich App at 237-38, make clear that novelty is only one of several factors relevant to the analysis of all expert testimony, which also includes, among other things, whether the theory can be tested, was it reviewed by peers, and whether it is generally accepted in the scientific community. Id. The Court of Appeals' exclusive focus on the "novelty element" conflicts with controlling authority is not consistent with existing Michigan law.

IV. CONCLUSION

For the reasons stated herein, MHA respectfully requests that the Court (1) reverse and vacate the Court of Appeals opinion, (2) enter judgment in favor of Defendants, and (3) reaffirm Michigan's long standing law that Davis-Frye hearings are mandatory, and that the burden of proving admissibility rests with the party presenting the expert witness' testimony.

Respectfully submitted,

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